Supreme Court, U.S.
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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LISA LEE MINES (TERRILYNNE COAL COMPANY),
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; ALVA RUTTER,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The claimant in this federal black lung claim was denied benefits in a final decision. He filed a "duplicate claim" more than one year later, under 20 C.F.R. § 725.309. The duplicate claim resulted in an award. The questions presented for review are:

I. Does Section 725.309 of the Secretary of Labor's regulations violate the express one year limitation contained in the governing statute at 33 U.S.C. § 922?

II. What standard should be applied to allow entitlement on the basis of a "material change in conditions" under Section 725.309?

LIST OF PARTIES

The caption of the case in the proceeding before the United States Court of Appeals for the Fourth Circuit contains the names of the parties. Lisa Lee Mines and Terrilynne Coal Company (hereinafter, "Lisa Lee") were independent contractor companies, which were privately held and owned by the same individual. They did mining for Knox Creek Coal Company and Wellmore Coal Corporation and were insured by United Affiliates Corporation. The parent company for Knox Creek, Wellmore and United Affiliates is The United Company, which is privately held.

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PETITION FOR WRIT OF CERTIORARI

Lisa Lee respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on June 19, 1996, in order to resolve the conflict between the Fourth, Sixth, Seventh and Tenth Circuit Courts of Appeals and to address the important issue of the validity of Section 725.309.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit which gives rise to this petition is reported in 86 F.3d 1358 (4th Cir. 1996), and is reprinted in Appendix A hereto. This was a rehearing *en banc* of the opinion reported in 57 F.3d 402 (4th Cir. 1995),

which is reprinted in Appendix B. The decision of the United States Department of Labor Benefits Review Board, issued on September 30, 1994 (BRB No. 92-0338 BLA), was not reported and is reprinted in Appendix C. The decision of the administrative law judge, issued on October 11, 1991, is reported in the Black Lung Reporter ("BLR") at 15 BLR 3-735 (1991), and is reprinted in Appendix D. The Department of Labor issued a proposed decision and order of material change in condition and award of claim on November 13, 1989, an unreported order which is reprinted in Appendix E. The Department of Labor, in ruling on the initial application of the miner, issued a notice of denial on September 16, 1986, which was also an unreported order and is reprinted in Appendix F.

JURISDICTION

The judgment of the Fourth Circuit which is sought to be reviewed was entered, *en banc*, on June 19, 1996. (Appendix A, p. 1a.) The *en banc* decision followed the Fourth Circuit's order of November 16, 1995, which granted Alva Rutter's petition for rehearing and suggestion for rehearing *en banc*. (Appendix G, p. 51a.) The original decision of the Fourth Circuit was issued on June 16, 1995. (Appendix B, p. 21a.)

The jurisdiction of the Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254(1). Pursuant to Supreme Court Rule 13.1, this petition has been filed within ninety (90) days of the Fourth Circuit's *en banc* judgment.

STATUTES AND REGULATIONS INVOLVED

STATUTES:

33 U.S.C. § 922 provides:

> Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 8(f) [33 USCS § 907(f)], on the ground of a change

in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case (including a case under which payments are made pursuant to section 44(i) [33 USCS § 944(i)] in accordance with the procedure prescribed in respect of claims in section 19 [33 USCS § 919], and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. This section does not authorize the modification of settlements.

REGULATIONS:

20 C.F.R. § 725.309(d) provides:

(d) In the case of a claimant who files more than one claim for benefits under this part, the later claim shall be merged with the earlier claim for all purposes if the earlier claim is still pending. If the earlier miner's claim has been finally denied, the later claim shall also be denied, on the grounds of the prior denial, unless the deputy commissioner determines that there has been a material change in conditions or the later claim is a request for modification and the requirements of § 725.310 are met. If an

earlier survivor's claim filed under this part has been finally denied, the new claim filed under this part shall also be denied unless the deputy commissioner determines that the later claim is a request for modification and the requirements of § 725.310 are met.

STATEMENT OF THE CASE

On July 1, 1986, Alva Rutter (hereinafter, Mr. Rutter or claimant) filed a claim for benefits under the Black Lung Benefits Act.[1] (Director's Exhibit 41.) The Department of Labor Office of Workers' Compensation Programs denied the claim, despite evidence of complicated pneumoconiosis, on September 16, 1986. (Appendix F, p. 48a.) Mr. Rutter was advised of his right to take further action within sixty (60) days to challenge the denial. (*Id.*) He was also advised that he could seek modification, as provided by 33 U.S.C. § 922 and 20 C.F.R. § 725.310, within one year. (*Id.*) Mr. Rutter took no further action within the one year period following the denial of benefits.

More than two and one-half years after the Department of Labor denied his claim, Mr. Rutter filed a duplicate application, pursuant to 20 C.F.R. § 725.309(d), on April 25, 1989. (Director's Exhibit 1.) On November 13, 1989, the Office of Workers' Compensation Programs issued a proposed decision and order of material change in condition and award of claim. (Appendix E, p. 45a.) The award cited only to the newly developed evidence, without comparison of that evidence to the previously submitted evidence, and offered no explanation as to how the newly submitted evidence demonstrated a material change in conditions since the prior final denial dated September 16, 1986.

The medical evidence submitted with the original claim consisted of two x-ray readings of an x-ray film dated August 6, 1986. One physician read the x-ray as 2/2,

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[1] Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901, *et seq.*

category A, and the other physician read the x-ray as 2/3, category A. (Director's Exhibit 41.) Pulmonary function testing submitted with the original claim produced essentially normal results as did the blood gas testing. (*Id.*) After the duplicate claim was filed, two interpretations of an x-ray film dated June 16, 1989 were read as showing complicated pneumoconiosis. One physician read the x-ray as 2/3, category A, and another physician read the x-ray as 3/2, category B. (Director's Exhibits 20, 21.) Once again pulmonary function testing and blood gas testing produced essentially normal results. (Director's Exhibits 16, 19.) None of the objective testing produced results which would qualify for a finding of disability under the regulations at 20 C.F.R. § 718.204.

Lisa Lee requested that the matter be referred to the Office of Administrative Law Judges for a determination on the issue of whether a material change in conditions had been established. On October 11, 1991, Administrative Law Judge ("ALJ") Aaron Silverman issued a Decision and Order—Award of Benefits.[2]

The ALJ found that the x-ray evidence from both 1986 and 1989 was sufficient to satisfy the requirement of 30 U.S.C. § 921(c)(3), entitling claimant to an irrebuttable presumption of entitlement.[3] The ALJ concluded that the original denial of benefits was mistaken, stating:

> Based on the x-ray evidence at the time [of the original denial], there is no question that the deputy commissioner erred in denying the claim in 1986.

(Appendix D, p. 41a.) The ALJ did not make a finding of a "material change in conditions," but found instead that the newer evidence established a "deterioration," al-

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[2] *Alva Rutter v. Lisa Lee & Terrilynne Mines*, Case No. 90-BLA-857, 15 BLR 3-735 (1991). (Appendix D, p. 38a.)

[3] Under Section 411(c)(3) of the Act, 30 U.S.C. § 921(c)(3), a miner found to be afflicted with complicated pneumoconiosis is irrebuttably presumed to be totally disabled due to pneumoconiosis.

though objective testing both in 1986 and 1989 produced nonqualifying pulmonary function testing and nonqualifying blood gas testing. Without resolving the conflicts in the x-ray evidence, the judge, further, found that in 1986 the x-ray showed small opacities of 2/2 with a category A large opacity and in 1989 the x-ray showed opacities of greater profusion (3/2) plus a category B opacity. After incorrectly stating some of the test values, the ALJ concluded that the medical evidence showed a "definite progression of the disease." (Appendix D, p. 42a.) Assuming, however, that the evidence was inadequate to establish a material change of condition, the ALJ nevertheless concluded that the claimant was entitled to an award of benefits. He did so by declaring that the prior denial was "based on an error clearly evident on the face of the record owing to the unopposed x-ray readings of complicated pneumoconiosis. . ." (Appendix D, p. 43a.) The judge concluded that the deputy commissioner could not "by a mistake deny the claimant the benefits to which he was by law entitled" and the ALJ declared the denial "null and void *ab initio*" and not subject to the doctrine of *res judicata*. (*Id.*)

Lisa Lee pursued an appeal to the Benefits Review Board. On September 30, 1994, the Board affirmed the ALJ's decision. (Appendix C, p. 29a.) The Board acknowledged that the ALJ erred by not specifically determining that a material change in conditions had been established and that the ALJ erred in determining that the original denial of benefits was "null and void *ab initio*." Despite its finding of error, the Board concluded that the evidence was "sufficient to support a finding of a material change in conditions" under the Board's standard established in *Spese v. Peabody Coal Co.*, 11 BLR 1-174 (1988).[4] The Board refused to follow the standard

[4] In *Spese*, the Board interpreted the "material change in conditions" requirement of Section 725.309 to mean "evidence which is relevant and probative so that there is a reasonable possibility that it would change the prior administrative result."

for establishing a "material change in conditions" as established by the United States Court of Appeals for the Seventh Circuit in *Sahara Coal Company v. OWCP*, 946 F.2d 554 (7th Cir. 1991).[5]

Lisa Lee then petitioned for review to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit's jurisdiction to review the decision of the Benefits Review Board is provided by 33 U.S.C. § 921(c).

On June 16, 1995, the court vacated the award of benefits and adopted the standard for defining a "material change in conditions" as set forth by the Seventh Circuit in *Sahara Coal, supra.* (Appendix B, p. 21a.) The Board's *Spese* standard was specifically rejected and the decision was remanded to the ALJ for reconsideration of Mr. Rutter's claim under the newly adopted standard for defining a "material change in conditions." The court considered the "one element" standard for defining a "material change in conditions" urged by the Director and adopted by the United States Court of Appeals for the Sixth Circuit in *Sharondale Corporation v. Ross*, 42 F.3d 993 (6th Cir. 1994), but rejected that standard as reflecting the same "fundamental flaw as does the *Spese* standard."[6] 57 F.3d at 407. (Appendix B, p. 28a.)

Mr. Rutter petitioned for rehearing and suggested rehearing *en banc*, which was granted by order dated November 16, 1995. (Appendix G, p. 51a.) On June 19, 1996, a majority of the court affirmed the award, with six

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[5] In *Sahara Coal*, the Seventh Circuit rejected the Board's *Spese* standard as making "mincemeat of *res judicata*" and defined a "material change in conditions" as meaning that the claimant's pneumoconiosis "has progressed to the point of becoming totally disabling although it was not at the time of the first application."

[6] In *Sharondale Corporation*, the Sixth Circuit adopted a standard for defining a "material change in conditions" as meaning a change in "one element" of entitlement, after a comparison of the newly developed evidence with the evidence submitted with the original claim.

dissenting judges. (Appendix A, p. 1a.) The majority acknowledged that there is "no express statutory basis for the duplicate claims regulation," but declined to invalidate the regulation, finding that "[a] new black lung claim is not barred, as a matter of ordinary *res judicata*, by an earlier denial, because the claims are not the same." 86 F.3d at 1362-63. (Appendix A, pp. 8a-9a.) As authority for this proposition, the majority relied upon a workmen's compensation treatise, 3A.Larson, *The Law of Workmens' Compensation*, § 79.72(f) (1989). (*Id.*) Regarding the standard to apply to Section 725.309, the majority rejected the *Spese* and *Sahara Coal* standard. The majority expressed agreement with the "one element" standard advocated by the Director, but the majority rejected, in part, the Sixth Circuit's standard as adopted in *Sharondale*. The majority disagreed with the Sixth Circuit's requirement that the evidence submitted in the prior claim be compared with the evidence submitted with the duplicate application to determine whether it differed qualitatively. 86 F.3d at 1363, n.11. (Appendix A, p. 10a.) The court, then, determined that the evidence in this case would satisfy its standard for a "material change in conditions" and, therefore, affirmed the award.

The dissenting judges criticized the majority as being persuaded "by the sympathies of this case" and cited the Department of Labor's own discussion and comments underlying Section 725.309(d) as defining a "material change in conditions" as a "progression to total disability." 86 F.3d at 1365. (Appendix A, p. 16a.) The dissent reasoned that:

> The regulation was never intended to, nor does it, reach a person who was unquestionably disabled at the time of the initial denial, but erroneously held to be not disabled. The law provides avenues of relief—neither of which this claimant pursued—for a person who has been erroneously denied benefits. He may either appeal the erroneous decision, 20 C.F.R. §725.410(c), or seek modification of that decision,

> for up to a year after the denial, *id.* at § 725.310. He is not, however, entitled to benefits under the duplicate claim provision.

86 F.3d at 1366. (Appendix A, pp. 16a-17a.) The dissent, consistent with the original panel's decision, believed that the standard adopted by the Seventh Circuit in *Sahara Coal* provided a reasonable test to determine whether the claimant had established a "material change in conditions," stating:

> Of the various tests for determining eligibility for duplicate claim benefits, only the *Sahara* standard focuses upon the miner's *conditions* and requires that those conditions *change* in a way that is *material.* The majority's characterization notwithstanding, the *Sahara* standard does not require that the claimant show a material change "on every element previously decided against him," . . . . Rather, it requires only that the claimant show, through a comparison of the evidence existing at the time of his original denial of benefits and the evidence currently available, that he was not then, but is now, eligible for benefits. In other words, the focus of the *Sahara* standard is not on the conclusions reached as to the conditions, but rather on the underlying conditions themselves, which is exactly what Section 725.309(d)'s plain language demands. In no other possible way can it be determined whether the claimant's *conditions* have materially changed since the earlier denial of benefits . . . .
>
> Instead of "foundering" on principles of *res judicata* and collateral estoppel, as the majority contends, the *Sahara* standard actually represents too strict an application of those principles for the majority, because that standard, unlike the majority's standard, *does* require faithful adherence to the initial denial, irrespective of whether that denial was correct or incorrect.
>
> The court's tortured interpretation of the duplicate claims regulation comes about as a result of this one claimant's refusal either to appeal or to seek modifi-

> cation of an arguably erroneous decision and the court's unwillingness to accept the result that he may, as a consequence of his insouciance, find himself without remedy.

86 F.3d at 1367. (Appendix A, pp. 19a-20a.)

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S OPINION CONFLICTS WITH RULINGS BY THE SIXTH, SEVENTH AND TENTH CIRCUITS REGARDING THE STANDARD TO APPLY TO SECTION 725.309(d) OF THE SECRETARY OF LABOR'S REGULATIONS.

Interpretation of the meaning of the "material change in conditions" requirement of Section 725.309(d) for review of previously finally denied claims under the Black Lung Benefits Act has been the subject of conflict among the courts of appeals.[7] The Court has granted certiorari in prior cases arising under the Black Lung Benefits Act in order to resolve such conflicts and to decide issues of statutory and regulatory interpretation. *See Pittston Coal Group v. Sebben*, 488 U.S. 105, 107-08, 109 S.Ct. 414, 102 L.Ed.2d 408 (1988) (certiorari granted to decide statutory issue which was subject to circuit conflict); *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 695, 111 S.Ct. 2524, 115 L.Ed.2d 604 (1991) (certiorari granted in view of conflict among courts of appeals); *Director, OWCP v. Greenwich Collieries*, 512 U.S. ——, 114 S.Ct. 2251, 129 L.Ed.2d 221, 227 (granting certiorari to resolve conflict among the circuits).

The opinion of the majority of the Fourth Circuit in the instant case expressed specific disagreement with the

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[7] 20 C.F.R. § 725.309(d), provides in pertinent part:

> If the earlier miner's claim has been finally denied, the later claim shall also be denied, on the grounds of the prior denial, unless the deputy commissioner determines that there has been a material change in conditions or the later claim is a request for modification and the requirements of § 725.310 are met . . . .

Seventh Circuit's test for determining whether a claimant has established a "material change in conditions" for purposes of reopening a previously finally denied claim for benefits. 86 F.3d at 1363. (Appendix A, p. 11a.) The majority also expressed its disagreement, in part, with the standard adopted by the Sixth Circuit. 86 F.3d at 1363, n.11. (Appendix A, p. 10a.)

There are, in fact, five different standards being applied to determine whether a claimant has established a "material change in conditions."

The Benefits Review Board adopted its standard for what it believes constitutes a "material change in conditions" in *Spese, supra.* The Board defined a "material change in conditions" as "that evidence which is relevant and probative so that there is a reasonable possibility that it would change the prior administrative result." 11 BLR at 1-76. The Board's *Spese* standard has been rejected by each of the courts of appeals to have reviewed the issue, as discussed below. The Board, however, continues to apply this standard to any case which arises in a circuit which has not addressed the issue.

The Seventh Circuit, in *Sahara Coal, supra,* was the first circuit to reject the *Spese* standard. The Seventh Circuit ruled that the Board's standard constituted "a plain misreading of the regulation and makes mincemeat of *res judicata.*" 946 F.2d at 556. The Seventh Circuit, giving deference to the established principle of *res judicata,* defined a "material change in conditions" as meaning "either that the miner did not have black lung disease at the time of the first application but has since contracted it and become totally disabled by it, or that his disease has progressed to the point of becoming totally disabling although it was not at the time of the first application." 946 F.2d at 556. The Seventh Circuit reasoned that:

> It is not enough that the new application is supported by new evidence of disease or disability, because

> such evidence might show merely that the original denial was wrong, and would thereby constitute an impermissible collateral attack on that denial . . . . If the evidence shows not that his condition has worsened since the first application but merely that he should not have been turned down, he has failed to demonstrate a material change in his condition; he is merely attempting to relitigate his orignal claim . . . . The regulation cannot mean both that you can set aside the denial on the basis of new evidence within one year and that you can set aside the denial on the basis of new evidence at any time.

946 F.2d at 556-57.

The Sixth Circuit in *Sharondale, supra,* joined by the Third Circuit in *Labelle Processing Company v. Swarrow,* 72 F.3d 308 (3d Cir. 1995), adopted a standard for defining a "material change in conditions" which requires the claimant to establish only "one element" previously decided against the claimant.[8] The Sixth Circuit's standard specifically requires consideration of the evidence behind the earlier denial to determine whether it "differ[s] qualitatively" from the newly submitted evidence. Under the Sixth Circuit's standard, it is not sufficient for the ALJ in the second claim to merely disagree with the previous characterization of the strength of the evidence and no miner may receive benefits under the Sixth Circuit's standard "simply because [the original] claim should have been granted." 42 F.3d at 998-99.

The majority of the Fourth Circuit in the instant case adopted the "one element" standard, requiring the claimant to prove only one of the elements of entitlement

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[8] The Act imposes the burden of proof upon the claimant, sometimes with the assistance of persumptions, to establish three elements, including the presence of pneumoconiosis arising out of coal mine employment, a totally disabling respiratory or pulmonary impairment and that such impairment is "due to" pneumoconiosis. *See Mullins Coal Company, Inc. of Virginia v. Director, OWCP,* 484 U.S. 135, 108 S.Ct. 427, 98 L.Ed.2d 450 (1987).

previously adjudicated against the claimant. Under the Fourth Circuit's standard this may be accomplished on the basis of any evidence developed after the prior denial, without comparing the prior evidence to the newly developed evidence. The Fourth Circuit, unlike the Sixth Circuit, requires no "qualitative" difference between the prior evidence and the newly submitted evidence. The majority of the Fourth Circuit, specifically, declined to endorse the requirement of the Sixth Circuit to qualitatively compare the evidence submitted in the original denied claim with the evidence submitted with the duplicate application.

The Tenth Circuit, most recently addressed the standard to apply to Section 725.309. In *Wyoming Fuel Company v. Director, OWCP*, 90 F.3d 1502 (10th Cir. 1996), the court rejected the standards adopted by the Board and each of the other circuits, finding flaws in each of them. The Tenth Circuit, instead, held that:

> [I]n order to bring a duplicate claim, a claimant must prove for each element that actually was decided adversely to the claimant in the prior denial that there has been a material change in that condition since the prior claim was denied. [footnote omitted] In order to meet the claimant's threshold burden of proving a material change in a particular element, the claimant need not go as far as proving that he or she now satisfies the element. [footnote omitted] Instead, under the plain language of the statute and regulations, and consistent with *res judicata*, the claimant need show only that this element has worsened materially since the time of the prior denial.

Wyoming Fuel, supra, 90 F.3d at 1511.

These differing interpretations mean that the numerous claimants under the Black Lung Benefits Act, who file duplicate applications under Section 725.309, will have their applications considered under differing standards,

depending upon the circuit in which the coal mine employment was performed. In some cases, a miner may have worked in coal mines which fall within the jurisdiction of more than one circuit. The current conflict in the standards, therefore, produces an unworkable result. Certiorari is appropriate.

II. THE VALIDITY OF SECTION 725.309 IS AN IMPORTANT THRESHOLD ISSUE.

As a threshold inquiry into the application of Section 725.309 of the regulations, consideration should be given to the apparent inconsistency between the regulation and the one year restriction contained in 33 U.S.C. § 922.[9] Although there is no split among the circuits, this is an issue of importance to the proper application of the Act and to the principles of *res judicata* and finality. Independent of the conflict in the circuits, the Court may grant certiorari in this case because of the importance of the issue of the validity of the regulation and the impact of the regulation upon administration of the Act. *See Renegotiation Board v. Bannercraft Co.*, 415 U.S. 1, 11, 94 S.Ct. 1028, 39 L.Ed.2d 123 (1974) (certiorari granted because of importance of issue); *Banks v. Chicago Grain Trimmers Association*, 390 U.S. 459, 461, 88 S.Ct. 1140, 20 L.Ed.2d 30 (1968) (certiorari granted to consider questions concerning the administration of the Longshoremen's and Harbor Workers' Compensation Act).

The question presented is whether a new application for benefits filed more than one year after the rejection of the claim may provide a basis for entitlement in light of the specific one year restriction contained in Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 922. Section 22 imposes a specific one year

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[9] 33 U.S.C. § 922 is incorporated into the Black Lung Benefits Act by 30 U.S.C. § 932(a) and is implemented by 20 C.F.R. § 725.310.

limitation to consider whether the prior denial was mistaken or whether there was a "change in conditions." Section 725.309 of the regulations, as finally promulgated, eliminates the one year requirement and allows a "change in conditions" to justify relitigation at any time.[10]

In the absence of the one year limitation contained in Section 22, there can be no true finality of decisions under the Act for as long as the miner is living. Operators potentially can be subjected to repeated duplicate claims, with all the associated costs of litigation and potential liability. This Court, however, has favored application of *res judicata* to agency determinations that have obtained finality "to enforce repose." *Astoria Federal Savings and Loan Association v. Solimino,* 501 U.S. 104, 107, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991), quoting *United States v. Utah Constr. & Mining Co.,* 384 U.S. 394, 422, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966). Claimants under the Black Lung Benefits Act should be equally subject to the bar of *res judicata. Cf. Pittston, supra,* 488 U.S. 122-23.

Accordingly, certiorari also is appropriate in order to protect the principles of finality adopted by Congress.

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[10] The Secretary of Labor's originally proposed version of Section 725.309 would have imposed the one year requirement. 43 Fed. Reg. 17722, 17743 (April 25, 1978). The regulation, as finally adopted, dropped the one year requirement. 43 Fed. Reg. 36772, 36785 (Aug. 18, 1978).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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